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In the Supreme Court of the United [redacted]

[redacted]

No. [redacted]

[redacted]

A minor, by his next friend and father,
Thomas Owens,
Petitioner,

vs.

DONALD L. [redacted], et al.,
Respondents.

On Petition For Writ of Certiorari to the
United States Court of Appeals
For the Sixth Circuit.

[redacted]

Counsel F. Cuppy,
William C. Hermann,
Gerson W. Fenn,
Squire, Sanders & Dempsey,
1800 Union Commerce Building,
Cleveland, Ohio 44115,
Counsel for Respondents.

Of Counsel:

Norman F. J[illegible],
2321 The Superior Building,
Cleveland, Ohio 44114.

[redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1109.

THOMAS GUZICK, JR.,
A minor, by his next friend and father,
THOMAS GUZICK,
Petitioner,

VS.

DONALD L. DREBUS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION.

OPINIONS BELOW.

The opinions of the District Court and the Court of Appeals for the Sixth Circuit are fully presented in the Brief for the Petitioner. The opinion of the Court of Appeals is now reported at 431 F.2d 594 (6th Cir. 1970).

JURISDICTION.

The jurisdictional requisites adequately appear in the Brief for the Petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED.

The Constitutional provisions involved are adequately set out in the Brief for the Petitioner.

COUNTER STATEMENT OF QUESTIONS PRESENTED.

1. Whether public high school officials can, without violating the First Amendment rights of a student, suspend him for conduct which will materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.

2. Whether public high school officials can enforce, even-handedly, a forty-year-old rule forbidding the wearing of insignia when the rule's sole purpose and effect is to prevent material and substantial interference with the requirements of appropriate discipline in the operation of the school.

3. Respondents accept Question 3 as presented in the Brief for Petitioner.

4. Whether the particular environment of one public high school permits school officials there to enforce a rule which prohibits students from wearing insignia which they might have been permitted to wear at other public high schools.

COUNTER STATEMENT OF THE CASE.

For more than forty years Shaw High School in East Cleveland, Ohio ("Shaw") has had a widely publicized and even-handedly enforced rule banning the wearing of all insignia by the students during school hours within the school building, except those insignia which deal with school activities, such as school plays (389a, 398a-401a, 430a-434a, 465a-468a, 380a-381a, 366a, 417a-418a, 50a; R. 525, 538-541, 584-588, 633-636, 512-513, 484, 561-562, 17).

The rule originated to prevent the wearing of high school fraternity pins. It was found that fraternity members would discriminate against non-fraternity members

and fights developed in the corridors, in the lunchrooms and in the locker rooms (398a-399a; R. 538-539).

In the 1950s the rule was applied to prevent student gang members from wearing the names of the gangs on their clothing, e.g. "Vice Lords." Again, it was the experience of the school administrators that gang members, identified by their insignia, would band together to create disturbances and disrupt discipline within the school (399a-401a, 413a; R. 539-541, 557).

By the 1960s the racial composition of the neighborhood wherein Shaw is located had begun to change. More black students were enrolled until, by 1969, about 70 percent of the students, a substantial number of the faculty, school administrators and school board members were black. During this period the insignia rule was evenhandedly enforced to reduce racial tension by preventing both white and black students from wearing inflammatory insignia. "White Power" and "Black Power" buttons were taken from students (430a-433a, 436a-438a, 441a, 448a, 503a-505a; R. 584-587, 590-592, 596, 610, 702-704).

Shaw is housed in aging buildings. Some 1,900 students hurry back and forth to classes through narrow corridors and even through an underground tunnel (405a-409a; R. 545-549). Included in the record is a photograph of students jam-packed together in a corridor (Def. Ex. K, 436a; R. 590, 761). The photograph was used in a campaign for a bond issue to build a new school building. By an unusual coincidence, in the midst of the photograph stares out the troubled face of the plaintiff in the case at bar (407a; R. 547).

In spite of its crowded and confused physical plant, Shaw has tried hard to maintain a good scholastic status (Def. Ex. K, 436a, 420a, 451a; R. 590, 564, 613). Within the structure of the curriculum, every effort is made to

expose the students to the conflicting currents of thought in the adult world. Lectures in black history, theories of Thoreau and peaceful non-violence, as well as discussions of the War in Vietnam are held (511a-515a, 416a, 78a, 545a-547a; R. 711-715, 560, 45, 754-756).

During the fall of 1968 and the winter of 1969 racial troubles plagued every large integrated urban high school on Cleveland's east side except Shaw (111a-112a, 223a, 125a-126a, 230a-231a; R. 79-80, 295, 99-100, 302-303). Riots closed several. One of the riots was over the wearing of a distinctive insignia by a student (225a, 230a-231a; R. 297, 302-303).

In the weeks following the assassination of Martin Luther King racial tensions throughout all integrated public high schools in the Greater Cleveland area intensified. At Shaw a white student's button reading "Happy Easter, Doctor King" was seized. The black students desired to wear medallions bearing Dr. King's picture. School officials met with leaders of the militant wing of the black community and explained the Shaw insignia rule to them. The leaders agreed to advise the community to abide by the rule and the medallions were prohibited, without incident (347a-350a, 432a-437a; R. 463-466, 586-591).

For some time prior to February 24, 1969, certain adult groups in Cleveland had been organizing high school and junior high school students in opposition to the War in Vietnam. "Legal" memoranda had been sent to high school officials throughout the Greater Cleveland area purporting to set forth students' rights to demonstrate and take other action in opposition to the war in Vietnam, such as the wearing of insignia (Plfs. Ex. 19, 20; R. 278, 434, 494, 762). Meetings were held in Cleveland at which students' rights to distribute leaflets were asserted (152a-

161a, 172a-176a; R. 144-153, 183-186). The school officials had agreed to meet with representatives of the American Civil Liberties Union to discuss the issue (410a-411a; R. 554-555).

As the opinion in the Sixth Circuit points out (431 F.2d at 595; Petitioner's Appendix at 48), plaintiff came to school on March 10 and 11, 1969, wearing a button in violation of the insignia rule because his lawyer told him he could do so (152a; R. 144). The alleged statement of the principal, Mr. Drebus, that Supreme Court rulings did not apply at Shaw was contradicted both by Mr. Drebus and the other adult witness to the meeting between the plaintiff and the principal (493a-500a; R. 669-699). The testimony of Mr. Drebus as to what took place at this meeting is illuminating. It is as follows (516a-520a; R. 716-720):

> "They walked into the office and said, 'Mr. Drebus, we are going to pass these pamphlets out today.' My immediate reaction was, 'No, you will not pass them out.' That's actually what I said.
>
> "The boys have said that they would pass them out whether I like it or not, and I told them, 'If you pass out one of those pamphlets in this school today I will suspend you. You are violating the rules.'
>
> ". . . .
>
> "In essence this conversation proceeded for a few seconds. One of the boys again told me that there is a Supreme Court decision recently that said that they could pass out the literature.
>
> "Q. Did he tell you who told them that?
>
> "A. Yes, sir. And then—
>
> "Q. Did he say who told them?
>
> "A. Mr. Gordon. He said Mr. Gordon told them they had the right to do this in school.
>
> "I said, at that time, I told them that we were aware of Mr. Gordon's pamphlet, that we were seek-

ing legal counsel, until then the school ruled what [rule that] we had been enforcing would be enforced. If we found out in the future that our position was not within the realm of the law, we would then alter the position, but until then the rule was in effect and I was bound to enforce it.

"I also asked them after the pamphlet situation to remove their buttons because that was against the rules. They also said at that time that they would not remove them, that I was violating a civil right that they had, and they would see Mr. Gordon about that, in essence.

". . . .

"Well, as I told them that they would have to leave, they said they were going to see Mr. Gordon."

Mr. Drebus then went to the home liaison man and asked him to go to the boy's father and explain what had happened. The boy's father called the principal a few minutes later and said he would send the boy back to school without the button.

However, instead of coming back to school the boy went to see Mr. Gordon, the lawyer, who is still the lawyer, and the case at bar was filed within a week.

There are certain misstatements in Petitioner's brief.

Among these is the allegation of the students' lack of knowledge of the rule regarding insignia. Plaintiff himself knew that his friend had been suspended from school for wearing the same button just a few weeks previously (295a; R. 384). The evidence also showed, as both the District Court and the Court of Appeals have found, that the insignia rule was widely publicized and even-handedly applied to all wearers of insignia (389a, 398a-401a, 430a-434a, 465a-468a, 380a-381a, 366a, 417a-418a, 50a; R. 525, 561-562, 584-588, 634-636, 539-541, 484, 512-513, 17).

Petitioner's argument to the contrary is principally based on the wearing of a Nixon button by one eleventh-grader. The record limits this to a three-hour wearing, which no teacher saw (130a; R. 106). The rule was carefully promulgated to students and parents both in the junior high school and later at the senior high school. The record on this is complete (417a-420a, 430a-437a, 54a; R. 561-564, 584-591, 21).

Petitioner's ludicrous allegation that respondents made only a "meagre showing" that the wearing of the button would substantially and materially interfere with the educational process (Petitioner's Brief at 9) is massively refuted by the record. Among other testimony the following are excerpts from the evidence dealing with the disruption that would occur if the button were permitted to be worn:

George Beasley is employed by the United States Equal Employment Opportunities Commission. He is a black man. He is also a member of the East Cleveland School Board. Two of his children were in Shaw at the time this lawsuit began and one had graduated. Mr. Beasley testified he had been familiar with the insignia rule since 1963 (346a; R. 462). He stated that the wearing of the button by plaintiff would mean that every student in the school should be privileged to wear his or her insignia no matter what it said. He stated this would cause unrest at Shaw and he was certain would lead to fights and disorders (347a, 350a; R. 463, 466). From his experience working in the black community, with CORE, NAACP, Muslims and Black Nationalists, he testified their reaction would be:

> " 'Duke, you had advised that we not wear our buttons and still some of the students are permitted to wear theirs. Why?' It would be a question why a

white kid could and they could not." (349a-350a; R. 465-466.)

His further testimony, on cross-examination, was just as unequivocal (357a-358a; R. 474-475).

> "It is not wearing the button per se. Perhaps you don't understand what I am trying to tell you. It is a very, very real, serious, high tension among black and white in the City of East Cleveland and individuals including myself and many other whites have been working since I went into that area to try to keep the peace. Anything that was said at all, you will have situations like you have had all over this Greater Cleveland area, and if that one button has to cause it, then you have to look very seriously at what that button might do. It is not just a button; that's all they need is some incident, one little grievance that there is not equality in the treatment of blacks and whites and East Cleveland is going up." (360a; R. 477.)

Similar testimony was given by three other school board members, Robert A. Henderson (364a, 366a, 369a-370a; R. 482, 484, 489-490), Leslie Reardon (380a-381a; R. 512-513), and Dr. Irwin Schrader, who is a university professor at Case-Western Reserve (329a-331a, 337a; R. 441-443, 451).

The Superintendent of Schools testified that if the plaintiff were permitted to wear his button it would "greatly affect the discipline, the possibility of commotion and even possibly lead to violence in Shaw" (390a; R. 526). The result would be "disastrous" (392a; R. 528).

John Christopher is the Administrative Assistant to the Superintendent. He happens to be black. His duties require a knowledge of the homes and parents, as well as the students, at Shaw (430a-432a, 449a-450a; R. 584-586, 611-612). His testimony is the most articulate and comprehensive given at the trial on the inevitability of vio-

lence stemming from the wearing of the button (429a-459a; R. 583-621).

Mr. Christopher first explained how the insignia rule was publicized both to children and parents (430a-432a; R. 584-586). He described the incident the year before when a black student wore a medallion with a picture of Martin Luther King on one side and on the other side the inscription "We Shall Overcome." The lad had been stopped in the hall by one of the teachers and asked to put the medallion beneath his outer garment. He refused. Ultimately, Mr. Christopher took him home and met with his mother. The next morning he received a call from the field director of the Committee on Racial Equality, Mr. Arthur Evans. Mr. Evans agreed that if this was the rule of the school then the boy "would have to abide by the rule" (433a; R. 587), and he did.

Mr. Christopher testified that to allow the plaintiff to wear his button would open the door for all other buttons and symbols. He used, as example, two buttons that had been offered in evidence; one said "White and Right" and the other was a black arm raised with a clenched fist. He said that if a white boy wearing a "White and Right" button met a black boy in the crowded corridors at Shaw wearing the black arm button with the clenched fist, "chaos" would result (436a; R. 590). He was asked, suppose the white boy were wearing a little button that said "Happy Easter, Dr. King." The record then reads as follows (437a-438a; R. 591-592):

> "Q. That happened didn't it?
>
> "A. Yes, it did, and it ended up in a fight right there in the cafeteria.
>
> "Q. Boys will be boys, will they not, sir?
>
> "A. But I think it can aggravate boys and cause boys to be more so boys than they would normally have been with such buttons and pins and insignia."

He pointed out that wearing an insignia is "an outward sign that is noticeable [and] will have a tendency to create more of a situation or have a tendency to stir up more hostility because this is overt, this is something we can see" (441a; R. 596).

He finally, after vigorous cross-examination, stated that if the plaintiff wore the button to Shaw he, and the school administration, would be "incapable of controlling the situation that . . . would result" (448a; R. 610); there would be fighting and a riot (458a-459a; R. 620-621).

Strongly similar testimony that the wearing of the button by plaintiff would inevitably lead to substantial disruption in the requirements of appropriate discipline at the school were given by other witnesses. This included the testimony of parents (464a-473a; R. 632-643), P.T.A. members (466a-467a; R. 634-635), a para-professional whose job it was to keep discipline in the cafeteria, the hall-ways and in the girls' restrooms (478a-481a; R. 645-651) and the Assistant Superintendent who had been familiar with the insignia rule since his own high school days at Shaw (404a-416a; R. 544-560).

Both the District Court and the Court of Appeals for the Sixth Circuit reviewed the evidence in depth and found it convincing and undisputed that the wearing of plaintiff's button would inevitably lead to substantial disruption in the educational process and the requirements of appropriate discipline at Shaw High School. To say that such evidence was "meagre," as Petitioner does, is to mislead this Court.

REASONS FOR DENYING THE WRIT.

The petition for a writ of certiorari should be denied because the decisions below correctly applied this Court's opinion in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and effected a result consistent with the concerns voiced in *Tinker*, given obvious differences in the facts of each case. This case does not leave unresolved overriding questions of public policy. Further, a review of lower Federal Court decisions concerning First Amendment rights of public school students, decided since *Tinker*, demonstrates that differences in result arise from correctly applying the *Tinker* criteria to differing fact situations.

1. The courts below correctly interpreted and applied the rule laid down by this Court in Tinker v. Des Moines Independent Community School District.

This Court's decision in the *Tinker* case is completely dispositive of the present action. Both the District Court and the Court of Appeals recognized as controlling and correctly applied the criteria laid down in *Tinker*.

Petitioner's primary ground for urging this Court to grant certiorari is that "the facts of this case [are] identical to the facts in *Tinker*," and therefore should have resulted in a finding against the school, as in *Tinker*. However, both courts below expressly rejected such argument, after reviewing the evidence as summarized in the above counter statement of facts, and specifically found that the factual differences between the instant case and *Tinker* were sufficiently numerous and significant to dictate different results.

The facts confronting this Court in the *Tinker* case were (1) a hastily drawn rule prohibiting black armbands, (2) a school environment devoid of disruption or

turmoil, (3) no attempt by school authorities "to prohibit the wearing of all symbols of political or controversial significance" (393 U.S. at 510), (4) "no threats or acts of violence on school premises" (393 U.S. at 508), and (5) no actual disturbance of the education process or interference with the rights of other students (*id.*).

The *Tinker* decision emphasizes the importance of the factual situation:

> "|*T*|*he record does not demonstrate any facts* which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred." 393 U.S. at 514 (emphasis added).

Accordingly, the *Tinker* decision held:

> "Certainly where there is *no finding and no showing* that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained. *Burnside v. Byars, supra*, at 749."
>
> "In the present case, *the District Court made no such finding*, ..." 393 U.S. at 509 (emphasis added).

In *Tinker*, this Court faced a record barren of facts sufficient to justify a school's rule prohibiting black armbands. On the contrary, in the present case, the District Court specifically found on the record summarized above:

> "The evidence in this case has made it abundantly clear that the school authorities have a factual basis upon which to forecast substantial disruption of, or material interference with, school activities if student behavioral conduct regarding the wearing of buttons is not regulated." 305 F. Supp. 472, 483-84 (N.D. Ohio 1969); Petitioner's Appendix at 46.

The Court of Appeals conducted an independent examination of the same record and affirmed:

> "Plaintiff insists that the facts of this case bring it within the rule of Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). We are at once aware that unless *Tinker* can be distinguished, reversal is required. We consider that the facts of this case clearly provide such distinction." 431 F.2d 594, 595 (6th Cir. 1970); Petitioner's Appendix at 49.

Factually, the courts below found this case to be the precise *opposite* of *Tinker*. (1) This was no hastily drawn rule, but a rule "applied uniformly and consistently for at least forty years at both Shaw High School and Kirk Junior High." 305 F. Supp. at 476; Petitioner's Appendix at 29. (2) At Shaw, school authorities were not operating in an environment devoid of disruption, but in a school found by the District Court to have "a significant, perhaps serious, discipline problem," where "|t|ension . . . is at an incendiary point," and "school officials spend a great portion of their time disciplining students in an attempt to control this situation." 305 F. Supp. at 475; Petitioner's Appendix at 28. (3) In *Tinker*, this Court found: "It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance" (393 U.S. at 510); the Shaw rule has been uniformly applied to *all insignia and symbols* not related to school activity. 305 F. Supp. 476, Petitioner's Appendix at 29. (4) No threats or acts of violence occurred in *Tinker*, but buttons have caused at least one fight in Shaw High School, threatened to cause others and have fostered divisiveness and polarization of students groups. 305 F. Supp. at 476-77; Petitioner's Appendix at 30-31.

We agree with Petitioner that a proper interpretation of the *Tinker* case is seen in *Aguirre v. Tahoka Independent School District*, 311 F. Supp. 664 (N.D. Tex. 1970), where the suspension of students wearing brown armbands was held unconstitutional. In *Aguirre* there was no dress regulation in effect and one was hastily promulgated in response to the brown armbands. The Court found no real evidence of disruption, and found that there was "no showing that the wearing of the armbands by plaintiffs and the class they represent would materially and substantially interfere with the requirements of appropriate discipline or be disruptive of normal educational functions." 311 F. Supp. at 666. However, the opinion goes on to state that in a "more aggravated situation" a finding for the school could be justified, citing *Butts v. Dallas Independent School District*, 306 F. Supp. 488 (N.D. Tex. 1969).

The evidence available in *Tinker* and *Aguirre* was not sufficient to justify the school authorities' "forecast" of interference with school work and rights of other students, and their invocation of a symbol ban. On the clear record of facts existing at Shaw, the courts below found the opposite: that, applying both the letter and the spirit of *Tinker*, there was abundant evidence to justify school administrators' forecasting of interference with the educational process and the rights of other students, and their enforcement of the no-symbol rule.

2. The Shaw rule banning all symbols and insignia, in an effort to cut down on points of friction in a tense school environment, does not raise questions of "overbreadth."

This Court has repeatedly held that the state may not regulate First Amendment rights by means of rules which "sweep overbroadly," thereby prohibiting activities which can be proscribed and those which cannot in the same stroke. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *NAACP v. Alabama*, 377 U.S. 288 (1964); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

Petitioner has maintained that the doctrine of overbreadth should have been applied to invalidate the Shaw rule because the rule prohibits *all* non-school-related symbols and insignia. Petitioner would require "[c]arefully defined regulations" prohibiting some symbols and permitting others. Presumably, if any semblance of Due Process is to prevail, such regulations would clearly specify those symbolic subjects which are permitted and those which are not.

The impossibility of such attenuated application of the overbreadth doctrine, in the specific situation existing at Shaw, was pointed out by the District Court:

> "[A]ny rule which attempts to permit the wearing of some buttons, but not others, would be virtually impossible to administer. It would involve school officials in a continuous search of the halls for students wearing the prohibited type of buttons. It would occasion ad hoc and inconsistent application. It would make the determination of permissible versus impermissible buttons difficult, if not impossible. It would make it difficult for the school officials to give both the substance and appearance of fairness, and

would deprive the school officials of their present position of neutrality." 305 F. Supp. at 477-78; Petitioner's Appendix at 33.

Petitioner would have this Court invoke a "regulatory maze" "wholly lacking in 'terms susceptible of objective measurement.'" *Keyishian v. Board of Regents*, 385 U.S. at 604.

In *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), the Court stated:

> "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."

Accord, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 507. P. Haskell, "Student Expression in the Public Schools: *Tinker* Distinguished," 59 Geo. L. J. 37, 54 (1970).

In *Tinker*, school administrators performed a deliberate and selective act of suppression directed against symbolic comment on the War in Vietnam. It is precisely to avoid this type of "Big Brother," partisan suppression that Shaw officials enforce a completely neutral rule barring students from this type of non-verbal activity during the school day and within the school grounds. The rule cuts both ways: it bars the high school officials from forcing their own attitudes regarding current controversy on the students, a true detriment to interchange of ideas among the students. A neutral arbiter can inspire respect and encourage cooperation; a partisan selector

of "approved" styles of thinking and types of buttons inspires neither. As stated by Mr. Justice Frankfurter concurring in *Neimotko v. Maryland*, 340 U.S. 268, 275-76 (1951):

> "Adjustment of the inevitable conflict between free speech and other interests is a problem as persistent as it is perplexing. It is important to bear in mind that this Court can only hope to set limits and point the way. It falls to the lot of legislative bodies and administrative officials to find practical solutions within the frame of our decisions."

3. The Tinker doctrine does not turn on whether the symbol-wearing student is himself disruptive, but whether, in the totality of circumstances, the educational process will suffer disruption.

Curtailing a non-violent person's free speech rights, in order to prevent disturbance by others, is clearly unpalatable when the object sought to be protected from disturbance is the vague notion of "public peace." *Terminiello v. Chicago*, 337 U.S. 1 (1949); *but see*, *Feiner v. New York*, 340 U.S. 315 (1951).

However, *Tinker* recognizes that there are greater limits on expression in the schoolhouse than in the community at large, because of the quite different interests involved. "The school environment is unique due to its physically confining nature, the immaturity of its population and the special demands and needs of the educational purpose." P. Haskell, *supra*, 59 GEO. L. J. at 57-58.

Tinker makes it clear that the need to protect the educational process from disruption arises regardless of who prompts the disruption:

> "But *conduct* by the student, in class or out of it, *which for any reason—whether it stems from time, place,*

> *or type of behavior—materially disrupts classwork* or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." 393 U.S. at 513 (emphasis added).

In effect, Petitioner would have this court shift the focus of its analysis from that established in *Tinker*—whether the educational process itself is subject to material and substantial disruption—and require instead that the decisional focus be placed upon whether or not the rule-violator was objectionable in his behavior.

Tinker held that the school authorities may regulate the wearing of expressive symbols, if they can demonstrate:

> "facts which might reasonably lead school authorities *to forecast* substantial disruption or material interference with school activities . . . ." 393 U.S. at 514 (emphasis added).

Clearly, then, situations arise where school officials' predictions of disorder can and must form the basis for control of symbol wearing.

What does *Tinker* lay down as the necessary basis for such predictions?

> "[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. . . .
>
> "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." 393 U.S. at 508-509.

The evidence is overwhelming in the present case that Shaw officials had clear and definite reason to anticipate that the wearing of a button by Petitioner would substantially interfere with the work of the school and impinge upon the rights of other students. As the District Court found:

> "In the present case, unlike the *Tinker* case, there is more than an 'undifferentiated fear' of a disturbance. There is a history of such disturbances caused or provoked by emblems. There is good reason to anticipate that disturbances will result in the future, if buttons are permitted. An uneasy truce exists now between the various groups in which there is a tacit understanding that buttons will not be worn by anyone." 305 F. Supp. at 480; Petitioner's Appendix at 39.

4. No question of denial of equal protection arises in application of a uniform rule to students in one school system, merely because all school systems in the area do not enforce the same rule.

Petitioner requests this Court to recognize that the Shaw no-symbol rule denies equal protection of the law because: (1) some other high schools in the area allow buttons and (2) the rule "is premised on racial factors."

The short answer to this argument is that the Fifth Circuit in dealing with an identical act, the wearing of a button at two separate high schools both located in the southern district of Mississippi, held that prohibition was unconstitutional under one set of facts and constitutional under a second set of facts. Compare *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966) with *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966). As a footnote shows in the *Burnside* case (363 F.2d at 746,

n. 1), the question of denial of equal protection was raised by the pleadings there but apparently abandoned by plaintiffs and not pressed as an issue on appeal. It is inconceivable that the Fifth Circuit, aware as it was of the equal protection claim, would have reached opposite results in the two cases had the Court not been persuaded that no violation of the equal protection right was involved.

As the Fifth Circuit stated in *Blackwell*: "A valuable constitutional right is involved and decisions must be made on a case by case basis." 363 F.2d at 753.

By comparison, it has been held that the Fourteenth Amendment guarantee of equal protection does not render unconstitutional a school regulation disallowing teachers' beards in one high school despite the fact that beards are allowed at another area high school.

> "|T|he difference in the composition of the student body at the two high schools in Pasadena and the variation in the intensity of desire on the part of their male students to wear beards justifies the difference in the administrative policies . . . ." *Finot v. Pasadena City Board of Education*, 250 Cal. App. 2d 189, 58 Cal. Rptr. 520, 525 (1967).

It is also argued that the Shaw symbol rule violates the equal protection clause because it is a "racial" classification. The necessity of the Shaw rule is based upon the regrettable fact of racial tension within the high school, a fact with which administrators and students alike must daily live in uneasy balance. The District Court found conclusively that the racial situation at Shaw was "incendiary." 305 F. Supp. at 475, Petitioner's Appendix at 28. Petitioner has presented no facts or arguments to dispute this obvious, if unfortunate, conclusion. The insignia rule is respected by the broad cross-section

of the East Cleveland community as a bar to escalation of racial conflict.

There can be no doubt that rules which discriminate in their effect between different races are highly suspect under the equal protection clause. *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Oyama v. California*, 332 U.S. 633 (1948). But to argue that a rule prohibiting insignia which applies equally to all students at Shaw regardless of their race, color, or ethnic background is somehow a racial classification is ridiculous. It is axiomatic that, to be a "racial classification" for purposes of the equal protection clause, the regulation must be *racially discriminatory* in purpose or motive. See generally, Note, "Developments in the Law—Equal Protection," 82 HARV. L. REV. 1065, 1087 *et seq.* (1969).

Perhaps the reason for Petitioner's attempts to fit this case into a context of racial discrimination is explained by the following:

> "|T|he pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable. Even so, education does not seem quite so fundamental as rights of criminal defense and voting. *Perhaps for this reason, those educational classifications which have been found to deny equal protection have involved a racial element as well.* . . . Even in cases where the classification proved harmful in fact to Negro educational opportunities, most courts have been reluctant to disturb the decisions of school boards acting without a racially discriminatory motive." *Id.* at 1129 (footnotes omitted).

Petitioner's appeal to the equal protection clause is not surprising. While certainly a vital and important constitutional doctrine, the equal protection clause is, as

Justice Holmes once remarked, "the usual last resort of constitutional arguments." *Buck v. Bell*, 274 U.S. 200, 208 (1927). However, the equal protection clause was not engrafted onto the constitution to prevent reasonable differences in regulation between the various academic institutions in our country, when such differences are based upon reasonable distinctions in the situations existing therein. As stated in THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, Senate Document No. 39, 88th Cong., 1st Sess. 1292 (1964 ed.): "Except where discrimination on the basis of race or nationality is shown, few police regulations have been found unconstitutional on this ground [equal protection]."

CONCLUSION.

The decisions of the courts below are in complete accord with the decisions of this Court, are based on a proper view of the administrative problems faced by public school officials in minimizing disruption to the educational process, and have correctly rejected Petitioner's arguments which are based upon a misconception of decisions of this Court and upon obiter dictum and non-comparable fact situations faced by other courts in their decisions.

For the foregoing reasons, this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

CHARLES F. CLARKE,
WILLIAM C. HARTMAN,
GEORGE W. PRING,
SQUIRE, SANDERS & DEMPSEY,
1800 Union Commerce Building,
Cleveland, Ohio 44115,
Counsel for Respondents.

Of Counsel:

RICHARD F. STEVENS,
2121 The Superior Building,
Cleveland, Ohio 44114.